



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

January 30, 1998

Mr. John Greene  
Assistant City Attorney  
City of Austin  
Law Department  
P.O. Box 1546  
Austin, Texas 78767-1546

OR98-0305

Dear Mr. Greene:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 112028.

The City of Austin (the "city") received requests for various information related to the city's drainage utility fee or the transportation fee, and refunds of drainage utility fees or the transportation fees. You assert that the information is excepted from disclosure pursuant to sections 552.103, 552.106, 552.107, and 552.111 of the Government Code. We have considered your arguments and have reviewed the submitted representative sample of documents.<sup>1</sup>

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the governing body is or may be a party. The governing body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The governing body must meet both prongs of this test for information to be excepted under section 552.103(a).

Litigation cannot be regarded as "reasonably anticipated" unless there is concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.

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<sup>1</sup>In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Open Records Decision Nos. 452 (1986), 331 (1982), 328 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision Nos. 452 (1986), 350 (1982). This office has concluded that litigation is reasonably anticipated when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, and when an attorney is hired who threatens to sue a governmental body. Open Records Decision Nos. 555 (1990), 551 (1990). However, the fact that an individual has hired an attorney, or that a request for information was made by an attorney, does not, without more, demonstrate that litigation is reasonably anticipated. Open Records Decision No. 361 (1983) at 2.

You inform this office that an attorney representing an individual who has been making claims for transportation and drainage utility fund refunds on behalf of various ratepayers stated to a city employee that "he intended to take action" concerning the city's correction of its fee calculation and refund practices. You further inform this office that this same attorney, during a meeting with the Mayor's aid concerning his client's refund requests, advised the mayor's aide that he intended to take "viable legal recourse" with respect to the refund issues. We conclude that the city has demonstrated that litigation is reasonably anticipated in this case and, upon review of the submitted information, find that most of the documents are related to the anticipated litigation, and may be withheld. However, we have marked a set of documents for which the city did not establish relatedness. Therefore, the city may not withhold the marked documents from disclosure under section 552.103(a).

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



June B. Harden  
Assistant Attorney General  
Open Records Division

JBH/gle

Ref.: ID# 112028

Enclosures: Submitted documents

cc: Mr. Don Walden  
Attorney at Law  
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(w/o enclosures)